

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action
	)	No. 13-10200-GAO
	)	
DZHOKHAR A. TSARNAEV, also	)	
known as Jahar Tsarni,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.  
UNITED STATES DISTRICT JUDGE

**LOBBY CONFERENCE**

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts 02210  
Tuesday, April 21, 2015  
9:16 a.m.

Marcia G. Patrisso, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
One Courthouse Way, Room 3510  
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Mechanical Steno - Computer-Aided Transcript

## 1 APPEARANCES:

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22 On Behalf of the Defendant  
23  
24  
25

P R O C E E D I N G S

THE COURT: So I understand there's some issues about exhibits and other evidence. I just wanted to be practical about it so we can get going, what we'll get the first part of the government case today, this morning, this afternoon maybe, including the opening.

MR. WEINREB: So I think probably the most efficient way to start is for us to review which of these exhibits we're not going to offer. That's all new.

THE COURT: Oh, I don't have the new list. My list goes through 1610, which was the end of last week.

LAW CLERK: I can go get the binder.

THE COURT: It's in the binder?

LAW CLERK: Yes.

MS. CLARKE: Would you mind if I grabbed my list?

THE COURT: No.

So, yeah, why don't you go get it.

(Pause.)

MR. WEINREB: So we already informed Mr. Bruck which witnesses on our list we won't be calling.

THE COURT: Okay.

MR. WEINREB: Does the Court want to know as well?

THE COURT: Sure. I want to know as much as I can know.

MR. WEINREB: Then we need that list. Actually,

1 Mr. Bruck has the list. He has his notes on it.

2 MR. BRUCK: Well, we've been told Karen McWatters  
3 won't be called, Lawrence, Williams, which are the emails;  
4 Danling Zhou.

5 THE COURT: Wait a minute. So on the list that I have  
6 has FBI Special Agent Lawrence or Williams. Neither?

7 MR. WEINREB: Neither.

8 MR. BRUCK: Lawrence or Williams. Okay.

9 And then moving down to Danling Zhou, we have crossed  
10 out, and also Laura Woods.

11 THE COURT: All right. But Jinyan Zhao will?

12 MR. WEINREB: Yes.

13 THE COURT: She's a relative?

14 MR. MELLIN: Right.

15 MR. WEINREB: Yes.

16 THE COURT: Okay.

17 MR. BRUCK: And those are the only ones that are  
18 definitely out.

19 MR. WEINREB: That's correct. And then with respect  
20 to exhibits, if there are any discrepancies, we can discuss it.  
21 So we don't intend to offer Exhibit 10, which is the first one.  
22 Exhibits 1603 and 1605 are noted as video survivors' montage.  
23 They are the subject of a defense motion. We're not going to  
24 offer those in the way that -- in the form -- we're not going  
25 to offer them at all, frankly. What we're going to offer

1 instead, to focus -- hopefully address the defense objection,  
2 is individual photos of each of the victims who actually  
3 suffered amputations, but fully dressed photos of them, not  
4 showing any scars or gore or anything like that, just them with  
5 their prosthetic limbs attached.

6 THE CLERK: Judge, here's a list.

7 THE COURT: I looked at these over the weekend, and  
8 1603, I didn't understand what it was. Maybe you could tell me  
9 what it is.

10 MR. WEINREB: Those are -- all of the 260 victims who  
11 suffered physical injury at the blast were asked to submit  
12 photographs of themselves, not showing their injuries or  
13 anything like that, just to -- so they could easily be  
14 identified in court, but...

15 THE COURT: So these are people who suffered some  
16 physical injury as a result of the bomb blast?

17 MR. WEINREB: Correct.

18 THE COURT: Okay. But you're not going to use, what,  
19 1603 or 1605, in that form?

20 MR. WEINREB: Correct. Now, those exhibits included  
21 photos of people who had lost limbs, and so we're just  
22 narrowing it down to that number, which I believe is 17 or 18  
23 people.

24 THE COURT: I see. Okay. Is there an objection to  
25 that? Let's just pause on that.

1 MS. CLARKE: Yes, same objection.

2 THE COURT: The generalized objection to that it's  
3 unnecessary on the grave risk. Is that it?

4 MR. BRUCK: Exactly.

5 MS. CLARKE: It's not relevant to any aggravating  
6 factor and the prejudice, probative value weighing.

7 MR. WEINREB: Your Honor, we would argue that it's  
8 relevant to several aggravating factors. One is grave risk.  
9 One is also substantial planning and premeditation to commit an  
10 act of terrorism, and --

11 MR. MELLIN: Cruel, heinous and depraved, the manner  
12 in which the act occurred.

13 MR. WEINREB: Evidence of how the act occurred.

14 MR. BRUCK: As to that, we think that that focuses on  
15 the murders, the homicides, not with reference to others.

16 MR. WEINREB: We're not saying that it was heinous,  
17 cruel and depraved as to these individuals but that these  
18 individuals -- what happened to them is evidence that it was  
19 heinous, cruel and depraved to the ones who died.

20 THE COURT: I think it is relevant evidence and  
21 admissible under the statute.

22 MR. WEINREB: We won't be offering any of these emails  
23 that are -- or translations that are 1611 to 1618. And I  
24 should just note for the record that to the extent that the  
25 defense seeks to introduce defendant emails or emails from

1 family members in its case, we may seek to offer them at that  
2 time to provide context, but not as --

3 THE COURT: Sure. I understand. Or as rebuttal,  
4 perhaps, afterwards.

5 MR. WEINREB: Or as rebuttal, perhaps.

6 MS. CLARKE: So, Bill, the 1600 series or the 1300  
7 series?

8 MR. WEINREB: I have them on this list at 1611 through  
9 1618.

10 MS. CLARKE: I've got a set of those and then a set  
11 that is 1347, '48, '49, '50, '51, '53, '54, '55, '56 and '57.

12 MR. WEINREB: Those are probably the same emails with  
13 different numbers.

14 MS. CLARKE: I don't believe so.

15 MR. BRUCK: Here's the list if you care to look at it.

16 MR. WEINREB: Sure.

17 (Pause.)

18 MR. WEINREB: I think these are the same emails. Have  
19 you looked at them?

20 MS. CLARKE: Yes.

21 MR. WEINREB: And you know they're not the same?

22 MS. CLARKE: They're different dates. They may be the  
23 same content on different dates.

24 MR. MELLIN: We can check and get back to you.

25 MS. CLARKE: If you're not planning on using emails --

1 MR. WEINREB: We're not planning on using any of the  
2 emails.

3 1621 to 1629, is that on the Court's list?

4 THE COURT: Yes. On this one, yes.

5 MR. WEINREB: We don't intend to use any of these  
6 photos of the grate; however, we do intend to use 1633, and  
7 I'll explain what that is. Government counsel moved down to  
8 Boylston Street when the barriers had been put back up for this  
9 year's marathon and stood at the grate where the bomb was  
10 exploded last year. And no photo that has been introduced into  
11 evidence to date captures adequately how close that the bag  
12 that was placed with the bomb in it was to the individuals  
13 lined up on the grate. You have to be there to perceive it.  
14 You can literally take one step and would have been able to  
15 touch those people on the head.

16 We considered asking the Court for a view because it's  
17 quite relevant to whether there was substantial planning and  
18 premeditation to commit an act of terrorism, to the cruel and  
19 heinous nature of the event and to the grave risk of death to  
20 people who were standing by the grate who did not, in fact,  
21 die, but we considered the idea of a view on Boylston Street to  
22 be impractical and so we looked for a way to bring the view  
23 into the courtroom for the jurors.

24 So Michelle Gamble, the FBI photographer who testified  
25 in the guilt phase, took photographs, overhead photographs of



1 the grate, and we have a precise one-on-one -- one-to-one scale  
2 model of the grate, basically the grate just in photographic  
3 form. The photo's been put onto a piece of Tyvek so that it's  
4 quite hard and you can step on it without doing any damage to  
5 it. And it accurately depicts the size of the grate, you can  
6 see where the bomb went off because the pieces that were  
7 shattered have been put back into place, and there will be a  
8 photograph that will make it clear where the barrier was. And  
9 that way, with the aid of this exhibit, the jury will be able  
10 to perceive precisely how close the bomb was to the people who  
11 were along the curb who were injured.

12 MS. CONRAD: Judge, first of all, we received this at  
13 7 p.m. last night. The photographs were taken, according to  
14 the metadata, on Friday at approximately 1 p.m. We received no  
15 explanation from the government as to why we weren't provided  
16 with these until 7 p.m. last night. And despite repeated  
17 emails asking for an explanation of what the relevance of these  
18 were or how they were going to be used or even at least  
19 initially through whom they were going to be offered, it was  
20 like pulling teeth to get an answer.

21 As far -- I have not gone back -- because I just heard  
22 this from Mr. Weinreb this morning as to what the purpose in  
23 offering this is. I have not gone back to the photographs from  
24 the actual scene in 2013 to see where those barriers were, but  
25 I don't think there's any showing that the barriers yesterday

1 were in the same place that they were in 2013.

2 MR. WEINREB: Well, we're not offering the location of  
3 where the barriers were yesterday. That was just a background  
4 as to what prompted the creation of this exhibit.

5 We intend to use a single photograph, Government's  
6 Exhibit 1575, which is already in evidence. It quite clearly  
7 depicts where the barrier was on the date of the actual  
8 marathon blast.

9 THE COURT: When do you expect to get to this?

10 MR. WEINREB: This afternoon. By "this afternoon," I  
11 mean after the break.

12 THE COURT: Yeah.

13 MR. WEINREB: So we have the exhibit --

14 THE COURT: Assuming the foundation, it sounds  
15 admissible to me.

16 MS. CONRAD: And the late disclosure?

17 THE COURT: Show me some prejudice, I guess.

18 MR. WEINREB: The grate has been in evidence. The  
19 actual grate was in evidence -- or not in evidence, rather, but  
20 was available in discovery. It was a 1B item that the defense  
21 had access to. So all this is, is a photograph of that grate.

22 THE COURT: Okay. On the proffer it sounds like it  
23 will be admitted.

24 MR. WEINREB: So that's it for preliminaries.

25 MR. BRUCK: We have a series of other objections that

1 have not been withdrawn. The most pressing one is the  
2 photograph of the defendant in his lockup. And the reason  
3 which the government has advised us they intended to use in  
4 opening statement and have an enormous mockup, the  
5 prejudice -- this is what it looks like.

6 THE COURT: I've seen it.

7 MR. BRUCK: The prejudice is really quite  
8 extraordinary because what this is is a still from a video that  
9 goes on for hours and the -- in context, it shows that the  
10 defendant is sort of using this picture as a mirror and he's  
11 kind of bouncing off the walls the way a 19-year-old kid with  
12 nothing to do for a long period of time might do, and then he's  
13 doing a little sort of dance and then he jumps up and he does a  
14 V sign. It's not clear whether he's addressing this as a  
15 camera or as a mirror.

16 And then for a split second, you have to really squint  
17 to see it, the V sign seems to turn into a -- or does turn into  
18 a finger. But if you cut a split second of this you create a  
19 completely false image of what is happening. I think the -- I  
20 think the Court needs to see it in context. And the immediate  
21 problem is that this absolutely should not be shown in opening  
22 statement out of context and let us not be able to answer it  
23 for a week.

24 The prejudicial effect of that would be -- even  
25 assuming that the Court admits it at all.

1 MS. CONRAD: A couple of things further on that,  
2 Judge. First of all, we have the video clip to show you if you  
3 would like to see it. But second of all --

4 THE COURT: How long is it?

5 MS. CONRAD: I'm sorry?

6 THE COURT: How long is it?

7 MR. WATKINS: Very short. Two minutes maybe, even.

8 MS. CONRAD: Do you want to see it before --

9 THE COURT: Go ahead.

10 MS. CONRAD: The other issue is that the context of  
11 this -- first of all, I think there's a discovery and a *Jencks*  
12 issue here. We wrote to the marshals after there was a report  
13 about this video in the *Boston Globe*, and the U.S. Marshals  
14 Service in Washington started an internal investigation that's  
15 now in the office of the Inspector General. And I have  
16 correspondence I could share with the Court regarding that  
17 investigation about how this video came to be disclosed to the  
18 press.

19 And I inquired yesterday of the general counsel,  
20 Gerald Auerbach, what the status of that is, and he told me  
21 it's still under investigation. Again, I have the  
22 correspondence to show your Honor, and I'd like it to be made  
23 part of the record.

24 But in addition, we have no *Jencks* for Deputy  
25 Oliveira. I assume Deputy Oliveira was questioned in

1 connection with this investigation. I've asked General Counsel  
2 Auerbach for any statements or reports written by or taken  
3 regarding -- statements by Deputy Oliveira, and he said he  
4 would inquire. We've received nothing from the government.  
5 And we would at least like an opportunity to determine whether  
6 there are such reports.

7 In addition, we filed an ex parte motion regarding  
8 further -- getting further information from the marshals,  
9 including an opportunity to inspect the camera before this  
10 evidence is presented.

11 MR. WEINREB: Your Honor, the claim that is made in  
12 the papers and that's made again here is that the image needs  
13 to be understood in context. That is an argument about the  
14 weight of the evidence, not its admissibility. And the way the  
15 defense counsel puts something in context is through  
16 cross-examination or in their own case.

17 They're always free on cross-examination of the  
18 witness to play the entire video, five minutes, ten minutes,  
19 however much they think is needed to put it in context and  
20 however much the Court will allow.

21 There's nothing prejudicial about showing an actual  
22 photographic image of something that the defendant undeniably  
23 did. It's not likely to confuse the jury, to mislead them. On  
24 the contrary. It's probative evidence of what his state of  
25 mind was at the time that he did it. And if the defense thinks

1 that it's not, that they should have another interpretation of  
2 it, they're always free to suggest that through  
3 cross-examination and argument.

4 Every other argument that was made today should have  
5 been made 15 months ago when we first produced this video in  
6 discovery. The defense has had it for 15 months. There's been  
7 no claim that it should be suppressed on some ground, no claim  
8 that there's anything wrong with it or that more information  
9 should have been produced.

10 I think the *Jencks* claim is a red herring. To the  
11 extent that the witnesses were interviewed about how --  
12 information about the video -- and by the way, I don't think  
13 the video itself ever appeared in the press, or a photograph of  
14 it. I think there were just reports of it that appeared in the  
15 press -- that's something for the marshals to deal with  
16 internally and it has nothing to do with its admissibility in  
17 this case and that would have nothing to do with the weight of  
18 the evidence. It would just be an effort to get into  
19 collateral matters that normally are decided outside of the  
20 jury's hearing, which is when there's an argument to suppress  
21 evidence based on a claim of misrepresentation in a search  
22 warrant. It would have nothing to do with the admissibility --  
23 once the admissibility of it is decided, that no longer has  
24 anything to do with the weight of the evidence.

25 So the government -- it's obvious why the defense

1 doesn't like this photograph. I don't need to articulate it.  
2 But the fact is that their client did it. It's nonverbal.  
3 There's no constitutional problems here. It's probative  
4 evidence. And certainly coming in, there's no reason why the  
5 government should not be able to both admit it and use it as an  
6 exhibit -- as a chalk in opening statements.

7 THE COURT: What about statements by Oliveira?

8 MR. WEINREB: If there is actual *Jencks* by Oliveira,  
9 then we'll produce it. But as far as we know, we're not aware  
10 of any and we don't believe that any statements that he might  
11 have made regarding how information about this may have  
12 appeared in the press would be *Jencks* material for him because  
13 it wouldn't relate to --

14 THE COURT: No, I agree with that.

15 MS. CONRAD: But it might be *Giglio*. If he's the  
16 subject of an investigation relating to this, it might be  
17 *Giglio*.

18 THE COURT: Remotely, perhaps. But what I was getting  
19 at is if he had something to say about -- did he learn of this  
20 gesture because he was observing at the time?

21 MR. WEINREB: I believe so, yes. I believe that he  
22 was --

23 THE COURT: So if he had statements about his  
24 observations, I think those would be *Jencks*.

25 MR. WEINREB: Yes. If there were written statements

1 about his observations.

2 THE COURT: And the circumstances of his discovering  
3 the tape or whatever it is.

4 MR. WEINREB: Yeah. I mean, if he wrote a report  
5 saying, "On such and such a date I was observing this and this  
6 is what I saw," then we would provide that as *Jencks*. I'm not  
7 aware of any such --

8 THE COURT: We're not going to get to him for a while,  
9 anyway, right?

10 MR. WEINREB: No, but --

11 THE COURT: But you want to use it in the opening.

12 MR. WEINREB: -- we want to use it as a chalk in the  
13 opening.

14 MS. CONRAD: This is the correspondence that we  
15 provided to the Court --

16 MR. WEINREB: I think this is truly a red herring; in  
17 fact, I would object to this going on the record. Whether  
18 somebody in the Marshal's Service did something, you know,  
19 that --

20 THE COURT: Right. I agree with that. I think that's  
21 beside the point. It does seem to me that if it's truly out of  
22 context and indicates something other than what the government  
23 suggests, then that can be shown to the government's  
24 embarrassment.

25 MR. BRUCK: The problem is the week interval. It



1 seems so unfair that the government --

2 THE COURT: Why can't you do it on  
3 cross-examination -- I mean, Oliveira is going to testify in  
4 the next day or so. You can --

5 MS. CONRAD: Can we show you the video?

6 THE COURT: Sure, if it's just two minutes.

7 MR. WEINREB: I'd also mention that to the extent  
8 Mr. Bruck's argument is that he's not going to have a chance to  
9 open for a week and say something about it, that's his choice,  
10 so...

11 THE COURT: All right.

12 (Video recording viewed.)

13 THE COURT: Is it just video and not audio?

14 MR. WATKINS: Exactly.

15 THE COURT: This is the day of the arraignment?

16 MR. WEINREB: Yes.

17 THE COURT: Before the arraignment?

18 MR. WEINREB: Approximately 11:30, and the arraignment  
19 was approximately 3:30.

20 THE COURT: And what determines the scope of this  
21 clip? Who decided when to start and when to stop?

22 MS. CLARKE: It's just the minute or two around  
23 that --

24 THE COURT: It's actually a lot less than that.

25 MS. CLARKE: Around the camera incident.

1 THE COURT: Is there a timer? There is at the top.

2 (Video recording viewed.)

3 MR. BRUCK: Do you see the problem?

4 THE COURT: So it's about 36 seconds, it looks like,  
5 by the counter. Okay.

6 MS. CONRAD: May I just note, your Honor, that this  
7 still was not provided in discovery. The still was not  
8 provided until last week. What was provided in discovery were  
9 the entire tapes from that day, not the isolated still. And in  
10 addition, if there is going to -- this is going to be  
11 presented, in addition to making a request for Mr. Oliveira's  
12 reports or statements, I would ask for any logs the marshals  
13 kept that day of Mr. Tsarnaev's conduct, any other observations  
14 that were made of him that day to put this in context. They  
15 had him under observation for an entire day, for about six  
16 hours.

17 MR. WEINREB: Your Honor, this was provided 15 months  
18 ago, at the time the discovery request --

19 THE COURT: I agree that that's discovery. But in  
20 terms of *Jencks*, if Oliveira has anything to say about it or I  
21 guess maybe anybody else who viewed it that might impeach his  
22 testimony about what he saw.

23 MR. WEINREB: I believe he's being offered just to  
24 authenticate this. And the photo speaks for itself. It's  
25 really just, This was a fair and accurate photo.

1 THE COURT: So I think it can be used.

2 MS. CLARKE: To be clear, I thought Mr. Weinreb  
3 suggested that our only objection was it was out of context.  
4 We have a more prejudicial and probative objection under the  
5 Death Penalty Act as well and --

6 THE COURT: Okay.

7 MS. CLARKE: And nobody knows what that bird or peace  
8 or whatever shot was to, to himself, to a camera, nobody knows,  
9 and it really takes a leap that the government, I think is  
10 trying to take unfair advantage of and it will confuse and  
11 prejudice the jury. We're already in a place in this case  
12 where there's a lot of loss, grief, pain, blood, damage. And  
13 to further inflame I think would be inappropriate.

14 THE COURT: Okay. I think it's admissible. And the  
15 video can be shown to contextualize it --

16 MR. BRUCK: If it's admissible, we want to emphasize  
17 this enormous blowup still should not be used in opening.

18 MR. MELLIN: Your Honor, it's no different than  
19 photographs.

20 THE COURT: I don't see why not. I understand why you  
21 don't like it, but I think it's admissible.

22 MS. CONRAD: I'll take that back if it's not being  
23 made part of the record.

24 MS. CLARKE: Your Honor, it has to be offered for an  
25 aggravating purpose in the death penalty, so I gather it's

1 being offered for lack of remorse?

2 THE COURT: That's what I infer.

3 MS. CLARKE: Thank you.

4 THE COURT: Anything else with respect to the exhibits  
5 that are proposed to be used that you want to use?

6 MS. CLARKE: I'm told that Ms. Pellegrini will use  
7 some photographs of the victims in her opening. There are some  
8 photographs of the victims in evidence already and she was not  
9 sure that they were the same ones, offered us an opportunity to  
10 look. But it seems like the Court ought to rule on the  
11 admissibility of those photographs if they're not ones that are  
12 already in evidence.

13 MR. WEINREB: Your Honor, they're just innocuous  
14 family photographs that don't show anything inflammatory. Just  
15 pictures of victims and life.

16 THE COURT: Yeah. Some number of pictures. I mean, I  
17 think it can be overdone. And actually, an issue I had with  
18 the montages was that it was just too much. I think photos in  
19 the montages can be used, but I think the compiling of the  
20 montages was an emotional impact that is separate from the  
21 informational value. So I would -- I think there's an  
22 objection to that, and I think the montages themselves are a  
23 little too emotional, but individual pictures from them can be  
24 selected and the witnesses can talk about them.

25 MR. WEINREB: Right. So we -- one thing we could do

1 is essentially use the montages like a PowerPoint, and  
2 basically one photo at a time in still, not rolling through it.

3 THE COURT: Yeah. But even then, however many are in  
4 any given montage may be too many, is what I'm saying. In  
5 other words, take the shortest one, which is Martin Richard.  
6 There's some information value pictures in there. I guess one  
7 people have seen is with his siblings. That shows something  
8 about their closeness and that's an informational value that  
9 the jury should understand, this is a close family and they'll  
10 miss him and so on and so forth. Every charming photo of him  
11 doesn't necessarily convey the same information value, I guess  
12 is what I'm saying. And that's true of the others as well.  
13 It's true of -- I think I'm thinking of Krystle Campbell. A  
14 lot of nice photographs, nice memories and so on, but it's a  
15 little too much.

16 At some point I think that the emotional tug outweighs  
17 the informational value, is all I'm saying. Giving another  
18 example, there's a picture of her with her extended family.  
19 That's informational value. All of these people are affected  
20 by this crime. Her, you know, dancing or saluting somebody  
21 with a drink, less so.

22 MR. WEINREB: Although I think you'll find, your  
23 Honor, that those photos were selected because they are the  
24 anchor for testimony.

25 THE COURT: Fine. If they illustrate a point that the

1 witness will make, then that's something else.

2 MR. WEINREB: Yes.

3 THE COURT: But just playing them straight through.

4 MR. WEINREB: This was a selection from among hundreds  
5 of options because they zero in on particular facets of the  
6 person's character, the loss of which is felt by --

7 THE COURT: Fine. The last thing is the Lingzi Lu's  
8 father's eulogy I've looked at again, and I think that can be  
9 played as-is. To the extent there's an objection to that, it's  
10 overruled.

11 So her montage -- so the Collier, Lu, Campbell and  
12 Richard montages should be disassembled, I guess. Individual  
13 pieces can be used.

14 MS. CLARKE: Judge, I guess there's -- I'm not sure  
15 whether there's a reason for the Court to rule now on the  
16 objections to the Marc Fucarile and Eric Whalley X-rays and  
17 medical pictures.

18 THE COURT: Yeah, tell me how those will be used.

19 MR. WEINREB: Those will be used to talk about grave  
20 risk of death.

21 THE COURT: Who will use them?

22 MR. WEINREB: The witnesses themselves will be on the  
23 witness stand. This is shrapnel that is in their bodies  
24 currently. With Marc Fucarile, for example, they were able to  
25 remove some of those pieces of shrapnel but he still has a

1 piece of shrapnel in his heart that can't be removed.

2 Mr. Whalley had a BB, actually, pierce his skull and travel  
3 through his brain.

4 THE COURT: Yeah. So normally this would be through a  
5 witness with medical competency.

6 MR. WEINREB: This is the phase of the trial when the  
7 rules of evidence are not strictly applied. So these are  
8 witnesses who have been told by their physicians what the  
9 medical significance of this is. They're not going to be  
10 offering expert medical testimony about it.

11 THE COURT: Right. I just want to isolate off that  
12 objection to what I think is the objection. In other words,  
13 the objection is not that it's the wrong witness; you object to  
14 the evidence itself for its --

15 MR. BRUCK: I have to say there is a threshold. It's  
16 true that the rules of evidence don't apply, but the  
17 confrontation clause applies to eligibility because under *Ring*  
18 *v. Arizona*, eligibility factors are constitutionally the  
19 equivalent of elements of a greater offense of capital murder,  
20 and there is a fair amount of case law that -- in the circuit  
21 courts that say that the Sixth Amendment right of confrontation  
22 does apply to the extent that the government is proving  
23 eligibility for the death penalty. We understand that this --

24 THE COURT: Are you talking about the gateway?

25 MS. CLARKE: Both.

1           MR. BRUCK: Yes, both gateway factors. Gateway and  
2 the statutory aggravating factors. Non-statutory aggravating  
3 factors, the law is weaker on that, and that's not the primary  
4 point we're making. But to the extent that the eligibility  
5 factor of grave risk of death is being proven by hearsay, we  
6 think that is a confrontation clause violation.

7           MR. MELLIN: Your Honor, it's not being proven by  
8 hearsay. These witnesses are getting on the stand and saying,  
9 "Yes, that is a photograph of me and that is a photograph of my  
10 injuries." I don't understand what the hearsay is necessarily.  
11 From Mr. Whalley -- Mr. Whalley has an MRI of his skull and  
12 there's a BB in his skull which he knows is inside his skull,  
13 so, from the damage from the -- entered in his temple and  
14 embedded in the side of his head.

15          THE COURT: It may depend on the particular image  
16 whether a layperson -- you know, you could go in and have an  
17 X-ray of your wrist done and then you could later see the  
18 product of that process and you could say, "That's my wrist  
19 because I was there and I can see the break." So it's possible  
20 for a witness to do that.

21          To the extent the witness only knows something because  
22 a doctor said that's what this is, I think there might be a  
23 problem. It's interesting whether that's hearsay or just  
24 foundation.

25          MR. WEINREB: And if the defense would prefer we put



1 in medical testimony how gravely these people were injured and  
2 how close they came to death, we could probably arrange a  
3 doctor to examine the films and the medical reports and give  
4 testimony about how close they came to death.

5 MR. BRUCK: It's a little late for that now.

6 MR. WEINREB: I don't think so.

7 THE COURT: Let's see how it goes.

8 MS. CLARKE: Well, Judge, is that a situation where we  
9 just have to object?

10 THE COURT: Yeah, I think so. We'll see what they  
11 found -- what the government offers before --

12 MR. BRUCK: There are some particular -- there's a  
13 picture of Mr. Whalley's heel which you cannot -- it's a  
14 grievous, hideous injury, and the picture -- I don't know if  
15 the Court has seen it.

16 THE COURT: I have.

17 MR. BRUCK: You know what I'm talking about. It goes  
18 to grievous injury which is not an aggravating factor. It does  
19 not tend to show grave risk of death. Whether it did or not,  
20 the probative effect of that -- I don't think that's the one  
21 you're offering but it's one where the heel is sewed up.

22 MS. CLARKE: That's 1599.

23 MR. BRUCK: Is it?

24 MS. CONRAD: Yeah.

25 MR. BRUCK: I mean, the prejudicial effect of that so

1 far outweighs its probative value that I don't think it's a  
2 close call under the Federal Death Penalty Act. It wouldn't be  
3 a close call under 403.

4 MR. MELLIN: Your Honor, to the contrary, I think this  
5 shows the grave risk of death these people are facing.

6 MR. BRUCK: Even if it did, that should not come in.

7 MR. WEINREB: Your Honor, we have a limited number of  
8 photos to choose from. Virtually all of them show some kind  
9 of -- some body part in some state that could -- is not what  
10 jurors are accustomed to seeing. So we have tried to avoid the  
11 bloodiest, the goriest, you know, the most shocking and picked  
12 ones that are relatively antiseptic. And for Marc Fucarile,  
13 for example, the X-ray photos are, by far, the least graphic of  
14 the many, many photos of his injuries that are utterly  
15 extraordinary in their -- we think the probative impact they  
16 would have on the jury but potentially an emotional one.

17 THE COURT: Well, I think -- I'll assess it as he  
18 testifies. We'll just see what the photo will add, if  
19 anything, at the time it's offered.

20 MR. BRUCK: May I ask you, with respect to this same  
21 witness, we have been told that he knew this was a terrorist  
22 attack because he had been present at a terrorist bombing in  
23 the past. We have no further information about that.

24 MS. CLARKE: In London in the 1970s.

25 MR. BRUCK: Well, we think that serves no probative

1 value whatsoever and is merely an inflammatory detail that  
2 should be excluded.

3 MR. WEINREB: One of our aggravating factors is that  
4 this was an act of -- there was substantial planning and  
5 premeditation to commit an act of terrorism. That's something  
6 the jury needs to hear evidence on. This is somebody who  
7 has --

8 THE COURT: I'm not sure --

9 MR. WEINREB: -- basically a lay expert, his firsthand  
10 experience of it from his own experience.

11 THE COURT: Again, we'll see how it is when he  
12 testifies.

13 MR. WEINREB: The defense is proposing to put on an  
14 expert to compare the defendant to other terrorists and say  
15 that evidently he wasn't as bad as them, so I think the  
16 comparison of this event to other events is something that  
17 they're planning on doing.

18 MS. CONRAD: I don't see how -- I guess we'll just  
19 have to object.

20 THE COURT: Okay. So how far do you think you'll get  
21 this morning, that is, up till one o'clock?

22 MR. WEINREB: Yes. Just up until one o'clock? I  
23 think --

24 MR. MELLIN: It's ten o'clock now.

25 MR. WEINREB: I think through the Campbells.

1 THE COURT: Through the Campbells?

2 MR. WEINREB: I would think so.

3 THE COURT: This is probably going to move along  
4 fairly quickly.

5 MR. WEINREB: Yes.

6 THE COURT: You may even be done tomorrow.

7 MR. WEINREB: We have several witnesses, four  
8 witnesses, in fact, who can only testify on Thursday.

9 THE COURT: On Thursday?

10 MR. WEINREB: Yes. That are flying in from various  
11 places.

12 THE COURT: Okay.

13 MR. WEINREB: Marc Fucarile --

14 THE COURT: So we might have a pause in the middle.

15 MR. WEINREB: Well, Wednesday I think we may finish at  
16 the lunch break. We've tried to time it so that the jury won't  
17 waste their time here. So the way that we anticipate it is  
18 that today we'll go nearly to the normal time, perhaps,  
19 tomorrow likely just through lunch, and then Thursday at least  
20 to the break.

21 THE COURT: I'm thinking this is Monday. Sorry. I  
22 dropped a day. I got it.

23 MR. WEINREB: Right. So they'll hear -- their time  
24 won't be wasted on any day.

25 THE COURT: Okay.

1 MS. CLARKE: Two other very quick matters, Judge.  
2 Michelle Gamble on the witness list is shown with the Martin  
3 Richard montage as an exhibit. I'm not aware that she is a  
4 victim impact witness and wouldn't be able to put those  
5 pictures in. We would object to that, to the use of an FBI  
6 official to introduce victim impact testimony which is not  
7 victim impact testimony.

8 MR. WEINREB: She would only be called to authenticate  
9 that the photos are, in fact, photos of the person depicted in  
10 them. We would be offering no testimony about them at all,  
11 it's really just to spare the surviving family members.

12 THE COURT: We're going to do that a different way  
13 anyway now.

14 MR. WEINREB: We weren't going to actually publish  
15 them to the jury through her. So she's just authenticating the  
16 photos. Frankly --

17 THE COURT: Well, you said 1603 and 1605 you're going  
18 to do a different way. Those are the other -- the injured  
19 people --

20 MR. WEINREB: Right. Right.

21 THE COURT: -- right?

22 And as to 1604, you were going to not use the montage  
23 as such but use pictures, so I'm not sure there's much for her  
24 to authenticate.

25 MR. WEINREB: Well, the pictures themselves to the

1 extent they need authentication.

2 THE COURT: Well, isn't Mrs. Richard going to testify?

3 MR. WEINREB: Well, the people, the family members  
4 themselves could authenticate them, but we're hoping to spare  
5 them the pain of having to do that.

6 THE COURT: I see. All right. She could probably do  
7 that.

8 MS. CLARKE: Well, I don't know how an FBI official  
9 gets to introduce or authenticate photographs that are to be  
10 victim impact testimony, and we'd object.

11 THE COURT: We'll have to hear what she says, about  
12 how she can authenticate them.

13 MS. CLARKE: The other thing, Judge, and I  
14 don't -- maybe this isn't an issue, is the government has  
15 listed 11B. That was the -- remember the video that was taken  
16 by this guy Kilgore and it kind of was --

17 THE COURT: We shut down the sound.

18 MS. CLARKE: We shut down the sound. And I assume the  
19 government will continue to shut down the sound.

20 MR. WEINREB: No. At this point, your Honor, our  
21 argument is that to whatever degree the probative value of that  
22 evidence might have been outweighed by its prejudicial  
23 potential for undue fair prejudice, now that we're in the  
24 penalty phase that the balance has shifted in the other  
25 direction, now it is -- the jury is being asked to focus on the

1 circumstances of the offense and what effect they have on  
2 people in terms of it being an act of terrorism, creating  
3 substantial danger, injury through just the panic and the  
4 response to the event as well as the event itself.

5 THE COURT: How long is it?

6 MR. WEINREB: Short.

7 MR. MELLIN: Maybe two minutes.

8 MR. WEINREB: Two minutes at the most, I think.

9 MS. CLARKE: Well, it doesn't go to an aggravating  
10 factor. It's clearly more prejudicial than probative. The  
11 Court already kept out the sound, and we would object.

12 THE COURT: I think it's probably admissible so I  
13 think it's a different calculus on this -- on this phase. It  
14 shows the horror of the event.

15 MS. CLARKE: That's not an aggravating factor.

16 THE COURT: Heinous.

17 MS. CLARKE: That's to the homicide victims, Judge.

18 MR. MELLIN: No, your Honor, it puts into context the  
19 homicide victims' pain.

20 MS. CLARKE: One last thing, Judge. On the grave risk  
21 of death argument as we have made it to the statutory  
22 aggravating factor, we have made the argument that that occurs  
23 when the act occurs and not the result of the act. And I take  
24 it the Court is ruling against us on that?

25 THE COURT: Yes. I think the attending consequences

1 are part of understanding the act.

2 MS. CLARKE: Including the medical complications  
3 suffered by someone as a result of the act?

4 MR. WEINREB: Yes, your Honor. Just as if somebody's  
5 injured and has a bullet in their body and 20 years later they  
6 die from it, they can be charged with murder. It's the  
7 understanding under the law of medical sequele that results  
8 from the act itself.

9 THE COURT: Okay. All right. So take a couple of  
10 minutes to get set up. We'll be out and we'll bring the jury  
11 out and I'll have the preliminary instructions and then I guess  
12 the opening.

13 MR. WEINREB: Okay. How long do you expect the  
14 instructions to be?

15 THE COURT: Not that long. About 20 minutes? 15  
16 minutes.

17 (The proceedings adjourned at 9:57 a.m.)  
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## C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso  
MARCIA G. PATRISSE, RMR, CRR  
Official Court Reporter

Date: 12/14/15